
In the Matter of the Compensation of
INDALECIO GONZALEZ, Claimant
WCB Case No. 00-09353
ORDER ON REVIEW
Lourdes Sanchez PC, Claimant Attorneys
Terrall & Terrall, Defense Attorneys

Reviewing Panel: Members Biehl, Phillips Polich, Langer, Lowell, and Bock.¹

Claimant requests review of Administrative Law Judge (ALJ) Mongrain's order that: (1) found that the self-insured employer was not required to close his claim as of December 12, 2000; (2) declined to address claimant's argument that the employer allegedly unreasonably failed to close the claim after December 12, 2000; and (3) declined to assess a penalty for the employer's allegedly unreasonable failure to close the claim as of December 12, 2000. On review, the issues are claim processing, scope of review, and penalties. We reverse.

FINDINGS OF FACT

We adopt the ALJ's findings of fact, but not the ultimate findings of fact.

CONCLUSIONS OF LAW AND OPINION

The ALJ determined that the issue raised by claimant's December 12, 2000 request for hearing was limited to the employer's failure to close the claim at that time. The ALJ found that there was no compensation due claimant and no resistance to the payment of compensation as of December 12, 2000 and, therefore, there was no basis for an award of a penalty or penalty-related attorney fee.

For the following reasons, we disagree with the ALJ's analysis and conclude that claimant is entitled to a penalty because the employer failed to comply with ORS 656.268(5)(b).

¹ On June 7, 2002, pursuant to a notice of public meeting, the Board decided to sit together as a panel of five to review a designated group of cases. This case was one of that limited group. Although reviewed by all of the members, this case does not involve an issue of first impression that has a profound impact on the workers' compensation system.

We begin by summarizing the pertinent facts. Claimant compensably injured his left ankle in August 1997 and the employer accepted a disabling left ankle fracture. (Ex. 3). A July 19, 1999 Order on Reconsideration awarded 5 percent scheduled permanent disability for loss of use or function of his left foot (ankle). (Ex. 8).

On March 10, 2000, Dr. Schmitz performed surgery on claimant's left ankle. (Ex. 12). The employer accepted a disabling aggravation claim on April 17, 2000. (Ex. 17). On June 1, 2000, Dr. Schmitz reported that claimant had persistent left ankle pain but anticipated that his symptoms would resolve. (Ex. 19-2). He released claimant to regular work on June 29, 2000. (Ex. 23).

In an August 1, 2000 chart note, Dr. Schmitz said that claimant's left ankle condition had improved, but was not "fully recuperated." (Ex. 21). On September 12, 2000, Dr. Schmitz explained that claimant was "medically stationary in terms of what I can offer the patient from a surgical standpoint." (Ex. 23). He noted, however, that claimant "may have some further improvement in the future[.]" (*Id.*)

On October 12, 2000, claimant's attorney wrote to the employer, requesting a Notice of Closure. (Ex. 23A). On November 1, 2000, the employer wrote to Dr. Schmitz, explaining that claimant needed a closing examination for the aggravation claim. (Ex. 24). The employer asked Dr. Schmitz to arrange a closing examination or notify the employer so that it could arrange an independent evaluation. (*Id.*)

On December 12, 2000, claimant's attorney submitted a request for hearing, asserting that the employer had refused to close the claim.

On February 9, 2001, Dr. Yarusso examined claimant on behalf of the employer and provided information on impairment. (Ex. 25).

Claimant's attorney wrote to the employer's attorney on February 26, 2001, indicating that she hoped the matter would be settled or that a notice of closure would be issued. (Ex. 26).

On March 8, 2001, Dr. Schmitz concurred with Dr. Yarusso's report. (Ex. 27). The employer apparently received that report by fax on March 20, 2001. (*Id.*)

On March 20, 2001, the parties agreed to submit their dispute to the ALJ based on written arguments in lieu of a hearing. Claimant argued that the employer had 10 days from his request for claim closure to either issue a Notice of Closure or a notice of refusal to close the claim, but it had not complied with those requirements, even though seven months had passed since he had requested closure. Claimant further asserted that the employer should have issued a notice of refusal to close the claim and it had not provided a reason for its failure to do so.

In the meantime, a Notice of Closure issued on June 12, 2001, which awarded no permanent disability. (Ex. 29).

On June 27, 2001, the ALJ held additional arguments. The ALJ indicated that he had initially found that, in addition to the employer's failure to close the claim as of the December 12, 2000 request for hearing, claimant had also raised an issue of the employer's failure to close the claim as of the date of his initial closing argument, which was received on April 6, 2001. (Tr. 1). The employer argued that the only issue before the ALJ was the employer's failure to close the claim as of the December 12, 2000 request for hearing. (Tr. 2-3). Claimant's attorney contended that the issue was not limited to the date of the request for hearing or to a particular time frame. (Tr. 5-6). Claimant's attorney asserted that, to the contrary, the "failure to close" issue was presented as an open-ended issue. (Tr. 6). Claimant requested a penalty and attorney fee.

The ALJ concluded that the issue raised by claimant's December 12, 2000 hearing request was limited to the employer's failure to close the claim at that time. (Opinion and Order at 4). The ALJ reasoned that, because the issue of the employer's failure to close beyond that date was not raised until claimant's initial argument on April 6, 2001, it was a "new issue" not raised until closing argument, which was untimely.

On review, claimant argues that he is entitled to a penalty for the employer's failure to close the claim and asserts that the issue was properly before the ALJ.

For the following reasons, we do not agree with the ALJ's conclusion that the issue raised by claimant's December 12, 2000 request for hearing was limited to the employer's failure to close the claim as of December 12, 2000. Instead, as claimant's attorney asserted at hearing, the issue of the employer's "refusal to close" was presented in the request for hearing as an open-ended issue.

In the employer's written closing argument at hearing, it explained:

“Claimant’s attorney also seems to be arguing that the employer has not acted quickly enough since October 2000 to effectuate claim closure. That is not an issue that was raised by claimant prior to the hearing date, and the employer objects to this additional issue being raised at this time. * * *” (Employer’s closing argument at 2-3).

The employer did not explain why its failure to close the claim was an “additional issue.” Claimant’s request for hearing specifically raised the issue of the employer’s “refusal to close claim.” The employer had not issued a notice of closure at the time the parties submitted closing arguments and claimant did not raise a “new” issue in closing argument. Under these circumstances, we do not limit the issue in claimant’s request for hearing to the employer’s failure to close the claim as of December 12, 2000. Claimant could not have known on December 12, 2000 that the employer would refuse to close the claim until June 12, 2001. *See Crowder v. Alumaflex*, 163 Or App 143, 148-49 (1999) (the claimant was not required to raise the issue of the new rates of permanent disability at a time that the new rates did not exist).

The ALJ’s order implies that periodic requests for claim closure are required. Even if we assume the ALJ was correct, claimant satisfied any such requirement on February 26, 2001, when his attorney wrote to the employer’s attorney, indicating that he hoped the matter would be settled or that a Notice of Closure would be issued. (Ex. 26). In any event, we do not agree with the ALJ that the only issue raised by claimant’s request for hearing concerned the employer’s failure to close the claim as of December 12, 2000.

We turn to the merits. ORS 656.268(5)(b) provides:

“If the worker has returned to work but the insurer or self-insured employer has not issued a notice of closure, the worker may request closure. *Within 10 days of receipt of a written request from the worker, the insurer or self-insured employer shall issue a notice of closure if the requirements of this section have been met or a notice of refusal to close if the requirements of this section have not been met.* A notice of refusal to close shall advise the worker of the decision not to close; of the right of the worker to request a hearing pursuant to ORS 656.283 within 60 days of the date of the notice of

refusal to close the claim; of the right to be represented by an attorney; and of such other information as the director may require.” (Emphasis supplied).

In construing ORS 656.268(5)(b), our task is to discern the intent of the legislature. The first level of analysis is to examine both the text and the context of the statute, including other provisions of the same statute. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11 (1993).

ORS 656.268(5)(b) allows a worker to request closure if he or she has returned to work. Claimant was released to regular work in June 2000. (Ex. 23). Claimant initially requested closure in an October 12, 2000 letter to the employer. (Ex. 23A). The employer received that letter at least by November 1, 2000, when it wrote to Dr. Schmitz concerning claim closure. (Ex. 24). Claimant’s attorney also sent a letter to the employer’s attorney on February 26, 2001, again requesting closure. (Ex. 26).

ORS 656.268(5)(b) provides that, within 10 days of receipt of a written request from the worker, the carrier “*shall* issue a notice of closure if the requirements of this section have been met or a notice of refusal to close if the requirements of this section have not been met.” (Emphasis supplied). *See also* OAR 436-030-0017 (WCD Admin Order No. 97-065; effective 1-15-98).²

² Former OAR 436-030-0017(1) (WCD Admin Order No. 97-065; effective 1-15-98) provides that a worker who has returned to work may request closure from the insurer and the “insurer *shall*, within 10 days of receipt of a written request, respond pursuant to ORS 656.268(4)(d).” (Emphasis supplied). OAR 436-030-0017(2) provides:

“If an insurer issues a notice of refusal to close the claim, the notice shall be identified in capital letters as a ‘NOTICE OF REFUSAL TO CLOSE’ and shall include the following information and appeal language:

“(a) name of the worker;

“(b) date of injury;

“(c) insurer's claim number;

“(d) mailing date of the notice;

“(e) the accepted and denied conditions;

“(f) IF YOU DISAGREE WITH THIS NOTICE OF REFUSAL TO CLOSE YOUR CLAIM, YOU MUST FILE A LETTER OF

After claimant sent the October 12, 2000 letter requesting closure, there is no evidence that the employer responded within 10 days of receipt of claimant's request. There is no evidence that the employer issued a notice of refusal to close the claim within 10 days of receipt of claimant's request for closure. The employer eventually issued a Notice of Closure on June 12, 2001, eight months after claimant's request. The "shall" language in ORS 656.268(5)(b) is mandatory. *Cf. Gevers v. Roadrunner Construction*, 156 Or App 168, 174-75 (1998) (the requirement in former ORS 656.726(3)(f)(C) that the director "shall" adopt a temporary rule in certain circumstances makes clear that the rulemaking process is not undertaken at the director's discretion); *Gallino v. Courtesy Pontiac-Buick-GMC*, 124 Or App 538, 541 (1993). Thus, ORS 656.268(5)(b) unambiguously requires the carrier, within 10 days of receipt of claimant's request for closure, to either close the claim or issue a notice of refusal to close the claim. The employer did not comply with the statutory requirements.

The ALJ acknowledged that the employer did not comply with ORS 656.268(5)(b), but essentially applied a "harmless error" analysis. We do not agree that the employer's failure to comply with ORS 656.268(5)(b) was "harmless error." *Cf. Fister v. South Hills Health Care*, 149 Or App 214, 219 (1997) (because the claimant's testimony provided some evidence from which the Board could have found that her work before the accident was "heavy," the Board's refusal to consider her testimony was not harmless). To the contrary, the

DISAGREEMENT WITH THE WORKERS' COMPENSATION BOARD WITHIN 60 DAYS FROM THE DATE OF THIS NOTICE. YOUR LETTER MUST STATE THAT YOU WANT A HEARING, NOTE YOUR ADDRESS AND THE DATE OF YOUR ACCIDENT, IF YOU KNOW THE DATE. YOU MUST MAIL YOUR LETTER OF DISAGREEMENT TO THE WORKERS' COMPENSATION BOARD, 2250 MCGILGHRIST STREET SE, SALEM, OR 97310. IF YOUR CLAIM QUALIFIES AND YOU REQUEST SUCH, YOU MAY RECEIVE AN EXPEDITED HEARING (WITHIN 30 DAYS). YOUR REQUEST CANNOT, BY LAW, AFFECT YOUR EMPLOYMENT. IF YOU DO NOT FILE YOUR LETTER OF DISAGREEMENT WITHIN 60 DAYS FROM THE DATE OF THIS NOTICE, YOUR HEARING MAY BE DENIED AS THE APPEAL TIME HAS PASSED. YOU MAY BE REPRESENTED BY AN ATTORNEY IF YOU SO CHOOSE."

At the time claimant requested closure in October 2000, the administrative rule in effect for OAR 436-035-0017 was WCD Admin Order No. 97-065, which was effective January 15, 1998. OAR 436-035-0017 has been amended since that time.

employer's failure to follow the requirements of that statute resulted in unnecessary delay in claim closure.

ORS 656.268(5)(d) provides:

“If an insurer or self-insured employer has closed a claim or refused to close a claim pursuant to this section, if the correctness of that notice of closure or refusal to close is at issue in a hearing on the claim and if a finding is made at the hearing that the notice of closure or refusal to close was not reasonable, a penalty shall be assessed against the insurer or self-insured employer and paid to the worker in an amount equal to 25 percent of all compensation determined to be then due the claimant.”

In *Clarinda S. Keys*, 53 Van Natta 1592 (2001), we explained the requirements for assessing a penalty under ORS 656.268(5)(d): (1) there must be closure or a refusal to close pursuant to section (5); (2) the "correctness" of the closure or refusal to close must be "at issue" in the hearing; and (3) a finding must be made at hearing that the closure or refusal to close was not reasonable.

Here, the employer failed to close the claim and did not issue a notice of refusal to close the claim after claimant requested closure on October 12, 2000, and again sought claim closure on February 26, 2001. Furthermore, the employer refused to close the claim for *eight months* after claimant's initial request for closure. As we previously determined, the "correctness" of the employer's refusal to close was at issue at hearing. Although the ALJ did not make a finding "at hearing" that the employer's refusal to close was not reasonable, the Board has *de novo* review. ORS 656.295(6); *cf. Christman v. SAIF*, 181 Or App 191 (2002) (in light of the Board's *de novo* review, it had broad discretion to consider arguments raised for the first time on appeal); *Destael v. Nicolai Co.*, 80 Or App 596, 600 (1986) ("The Board has *de novo* review and is free to make any disposition of the case it deems appropriate."). Pursuant to that review authority, we find the employer's refusal to close the claim was unreasonable.

Under these circumstances, we conclude that claimant is entitled to a penalty pursuant to ORS 656.268(5)(d) equal to 25 percent of all compensation determined to be "then due" by the June 12, 2001 Notice of Closure, which had issued at the time the hearings record was closed on June 27, 2001.

Claimant's attorney requests an "out-of-compensation" attorney fee based on the compensation awarded to claimant pursuant to the Notice of Closure. For the following reasons, we deny that request.

ORS 656.386(1) provides for assessed attorney fees in cases involving "denied claims." ORS 656.386(2) provides that "[i]n all other cases, attorney fees shall be paid from the increase in the claimant's compensation, if any, except as otherwise expressly provided in this chapter."

Claimant requested a hearing in December 2000, asserting that the employer had failed to close the claim. The June 12, 2001 Notice of Closure was issued after the ALJ initially closed the record on May 15, 2001, but before the record was finally closed on June 27, 2001. Under these circumstances, we find no basis in the statutes or administrative rules for an "out-of-compensation" attorney fee attorney fee. Claimant did not request a hearing on a denied claim, OAR 438-015-0035, and the ALJ did not award additional compensation for permanent or temporary disability. *See* OAR 438-015-0040, 438-015-0045. We, therefore, conclude that claimant's attorney is not entitled to an "out-of-compensation" attorney fee.

ORDER

The ALJ's order dated July 27, 2001 is reversed. Claimant is assessed a penalty against the employer pursuant to ORS 656.268(5)(d) equal to 25 percent of all compensation due at the time the record closed on June 27, 2001.

Entered at Salem, Oregon on August 6, 2002